

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERNHARD HEMBACH, as Trustee	:	CIVIL ACTION
in Bankruptcy of Escom AG and	:	
Amiga Technologies, GmbH,	:	NO. 97-3900
Plaintiff,	:	
	:	
v.	:	
	:	
QUIKPAK CORPORATION and	:	
DAVID A. ZIEMBICKI,	:	
Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J.

June 15, 1998

A hearing was held on plaintiff's motion for a preliminary injunction on April 29, 1998. Shortly after the hearing, the parties consented to the entry of a temporary restraining order (TRO). This consent was embodied in the court order of May 5, 1998. By various agreements thereafter, the TRO was extended until June 12, 1998.

Counsel have advised the court that an agreement cannot be reached to resolve the underlying complaint. Therefore, I must rule on the motion for a preliminary injunction.

After reviewing the testimony of the April 29, 1998 hearing as well as the briefs of counsel and the various exhibits attached, I conclude that plaintiff's motion should be granted.

The only difficult aspect of the traditional requirements for a preliminary injunction as far as plaintiff is concerned is the need to show irreparable harm.

The other prerequisites have been met by plaintiff and I will address each of them as follows:

First, the inventory at issue here is undisputably the property of Amiga and the defendant has been fully reimbursed for each and every item of inventory used in the manufacture of computers which it purchased on behalf of Amiga. (See testimony of David Ziembicki, N.T. 54, 56, 57). What is arguably in dispute is whether defendant has a security interest in it. The parties agree that there is no agreement in writing that would specifically provide for such an interest and that the only agreement in writing was that the inventory was fully the property of Amiga. (Ziembicki, N.T. 58, 59). From the testimony and exhibits, I also find that plaintiff has reasonable probability of success in his contention that there was no oral agreement creating a security interest in the inventory in question. (In this regard, see testimony of J. Edward Goff, N.T. 27; the testimony of Ziembicki that he didn't have much involvement with quotations and purchase orders which he left in the hands of Mr. Asousa (N.T. 68); and the general testimony of Samuel A. Frederick and Theodore Charles Asousa, neither of which establish specific terms of an oral agreement providing defendant

with a security interest in the inventory). Thus, plaintiff has demonstrated that he is likely to succeed on the merits of the underlying claim.

Second, granting the relief plaintiff is requesting; namely, that defendant be enjoined from selling the Amiga inventory currently in its possession until the underlying complaint is resolved, will not result in an even greater harm to defendant. There is some reason to believe that plaintiff will be left with no viable damage remedy if the inventory is disposed of by defendant prior to the resolution of the underlying claim. Defendant, on the other hand, if the injunction is granted may have a rather substantial business setback, the nature and likelihood of which has not been made totally clear from Ziembicki's testimony. In any event, this factor balances in favor of plaintiff.

Third, the public interest, to the extent that it can be ascertained in a case of this nature, is probably better served when procedures designed to allow for equal satisfaction of all creditors are not thwarted.

Finally, I return to the issue of irreparable harm. Defendant argues with some merit that the underlying claim is nothing more than the run-of-the-mill business dispute which can be remedied by money damages.

Both parties have directed my attention to Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186 (3rd Cir. 1990). One of the principal questions discussed in Hoxworth was: Can a District Court Issue a Preliminary Injunction to Protect a Damages Remedy?

As I read Hoxworth, the court answered the question in the affirmative, but added:

Of course, just because a district court enjoys the power to protect a potential future damages remedy with a preliminary injunction does not mean that such an injunction is appropriate in a run-of-the-mill damages action. The traditional requirements for obtaining equitable relief must be met. These include, in this context, a showing that plaintiffs are likely to become entitled to the encumbered funds upon final judgment and a showing that without the preliminary injunction, plaintiffs will probably be unable to recover those funds.

As I view this case, it is not a run-of-the-mill damage action. In the underlying complaint, plaintiff seeks, among other things, to replevy the inventory. While it is true that plaintiff could simply recover money damages to the extent the inventory was partially or entirely disposed of by defendant, the return of the actual inventory is the best damage remedy, making unnecessary surely conflicting opinions as to its value if it were disposed of.

An appropriate order follows.

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DAVID A. ZIEMBICKI,	:	
Defendants.	:	

O R D E R

AND NOW, this 15th day of June, 1998, plaintiff's Motion for Preliminary Injunction is **GRANTED** and it is hereby **ORDERED** that:

1. QuikPak Corporation and David A. Ziembicki are enjoined and restrained until further order of the court after trial of the underlying complaint from selling or otherwise disposing of any items comprising the Amiga inventory currently in possession of QuikPak or Zober Industries, Inc.;

2. QuikPak Corporation and David A. Ziembicki are enjoined and restrained until further order of the court after trial of the underlying complaint from expending or otherwise using the proceeds of any sales of Amiga computers that have already been built using any items of the Amiga inventory and are directed to maintain such proceeds under escrow at a bank and

upon such conditions to be agreed upon by the parties or determined by the court in the event the parties cannot agree;

3. This order shall be binding upon the parties to this action, their officers, agents, servants, employees and attorneys, and upon any person or persons in active concert with them who receive actual notice of this order by personal service or otherwise; and

4. This order shall become effective upon the giving of security by plaintiff in the amount of \$60,000.00 for the payment of such costs and damages as may be incurred or suffered by any defendant who is found to be wrongfully enjoined. The security may be in the form of cash deposited with the clerk of this court or a bond with corporate security approved by the clerk.

IT IS SO ORDERED.

BY THE COURT:

RONALD L. BUCKWALTER, J.